Supreme Court, U.S.
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No. 98-1744

In The

Supreme Court of the United States

JAMES TAYLOR,

Petitioner,

v.

SUSAN MONFILS, as special administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS, by Bruce R. Bachhuber, guardian ad litem,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals err by finding a police official liable under the state-created danger theory of substantive due process liability based on *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) and its progeny, where the evidence demonstrates that the official acted affirmatively to render a confidential citizen informant more vulnerable than he would otherwise have been to a danger that had been created and enhanced by subordinate members of the official's own police department, and then failed to protect that citizen from this increased danger, resulting in the citizen's brutal beating and murder?

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Defendant Taylor's Petition omits the district court's Decision and Order denying defendants' post-trial motions for judgment or new trial and the resulting November 24, 1997, amended final judgment, from which defendants appealed on December 17, 1997. These documents are attached in the Appendix to this Brief, at pages 1 and 5, respectively.[1]

STATEMENT OF THE CASE

On the afternoon of November 20, 1992, the Green Bay, Wisconsin, Police Department gave Keith Kutska a taped copy of Tom Monfils' anonymous call reporting Kutska's planned theft from the paper mill where both worked. Kutska identified Monfils from the tape, and early the next morning Kutska and five co-workers brutally beat Monfils, tied a 50-pound weight to his neck, and threw him, still alive, into a two-story pulp vat to drown. His body was found the next evening, mutilated below the thighs by the stirring propeller at the bottom of the vat. Kutska and his accomplices were convicted of first degree murder. Susan Monfils, whose children were 9 and 11 years old when her husband was murdered, lost all hope and attempted suicide.

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[1] Page references to this Appendix are denoted "Resp. App. [page number]." References to the Court of Appeals' Opinion and other documents contained in the Appendix to Taylor's Petition are denoted "Pet. App. [page number]."

Five years later, a jury found Green Bay Deputy Police Chief James Taylor liable for a violation of Tom Monfils' substantive due process rights for Taylor's central role in the release of the tape that revealed Monfils' identity to his killers. The jury awarded $2 million in compensatory damages to Monfils' widow and children. Taylor now petitions this Court to overturn this verdict on the ground that his role in this tragedy was entirely passive and thus invulnerable to constitutional liability.

A. Factual Background

The Petition's statement of "Factual Background" indulges in an aggressive misrepresentation of the true facts of this case that is carefully calculated to suggest that Taylor and other Police officials knew less and did less than was actually the case and that Monfils was himself somehow complicit in his own death. Petitioner has also ignored the rule that a reviewing court, particularly this Court, must view the evidence in the light most favorable to plaintiffs, providing plaintiffs with the benefit of all inferences that the evidence fairly supports.[2] Applying that standard, the evidence in this case reveals a true set of facts, as set forth below, that fully supports the Court of Appeals' finding of constitutional liability.

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[2] As the Court of Appeals correctly noted (Pet. App. 7), the issue defendants presented to it regarding Taylor's conduct challenged only the sufficiency of the evidence: "Is there sufficient credible evidence to support a finding that Deputy Chief Taylor violated Mr. Monfils' constitutional rights . . . ?" (Brief and Short Appendix of Appellants in Appeal No. 97-4179, p. 2.)

Early on November 10, 1992, Tom Monfils learned Keith Kutska planned a theft from the James River Paper Mill. Knowing Kutska was violent and a thief, Monfils called Green Bay Police anonymously to report the planned theft. (Ex. 4, 5).

The Police dispatcher, Michelle Wickman, agreed to take Monfils' information on condition that he remain anonymous. Wickman was aware that the call was taped, but she did not tell Monfils this or ask his consent to be recorded. (Ex. 5; Tr. 153).

Monfils reported Kutska's intended theft, adding that Kutska was violent and could fly off the handle if confronted. Monfils asked Wickman to call the mill's security office to assure that his involvement in reporting the crime would remain confidential. Wickman did so (Ex. 7, pp. 1, 2), and when plant security confronted Kutska he refused a search, for which he was suspended for five days without pay. (Tr. 169-70, 434-35).

Frightened that Kutska would find out he had reported Kutska to the Police, Monfils called the Police Department on November 12 and told Detective Denise Servais about the anonymous complaint he had made to the Department. Monfils told Servais that Kutska was irrational and violent. He was worried Kutska would find out he had reported him. Servais told Monfils there was "no way in hell" the tape of his call would get out. (Ex. 9, p. 5; Ex. 10).

Kutska called the Department on the morning of November 17 to find out if there was a record of the call that turned him in. Kutska told defendant Michael Mason, a lieutenant in administration who did not work

in the Records Office (Tr. 435-36, 513, 539), that he had been falsely accused of theft and wanted to confront the person who had accused him. (Tr. 436-37, 544-45, 557). Mason told Kutska that he would need to know the time of the call in order to locate the recording. (Tr. 437). At work that same day, Kutska learned the time of the call and announced to his co-workers, in Monfils' presence, that he was getting a copy of the tape. (Tr. 438, 1106-07).

Fearing that Kutska would get the tape, Monfils called the Department a third time on November 17 and asked to speak to the Department's highest on-duty authority. Monfils was connected to acting Shift Commander Lt. Ken LaTour (Ex. 9, p. 1; Tr. 203-04), to whom he described his original anonymous complaint. Monfils told LaTour that the man he reported was trying to get a tape of the call and would recognize Monfils' voice if he was given the tape. Monfils confirmed that the original call was to remain anonymous, emphasizing Kutska's violent nature to LaTour and the danger that Monfils would be badly hurt or killed if the tape were released. (Ex. 9, pp. 1, 2, 6-8). LaTour understood that Monfils feared for his life and safety if the tape were released. (Tr. pp. 224-25). LaTour told him the tape should not get out, and told Monfils to call Specialist John Lampkin, who worked with the tapes, to assure that it would not be released. (Tr. 217; Ex. 9, pp. 4, 5).

On November 18 Monfils called the Department for the fourth time. As directed by LaTour, he spoke to Specialist Lampkin and told him about his anonymous report and his fear that the tape would be released. Lampkin told him the tape would not be released. (Tr. 581-84).

On the morning of November 19, Kutska called Lt. Mason and gave him the time of Monfils' original report to the Department. Mason then checked the master recording for that day and quickly located and listened to Monfils' call. (Tr. 514-15, 538). Mason consulted Records Office Manager Shay Gierczak, who was unsure whether the tape could be released and called Assistant City Attorney Judith Schmidt-Lehman. (Tr. 551-52). Mason, the only one of the three who had listened to the tape, told Schmidt-Lehman incorrectly that the caller had received no promise of confidentiality, and she told him the tape could be released. (Tr. 554, 558). Mason called Kutska back that afternoon and told him that he could pick up the copy of the tape the next day, November 20. (Tr. 554).

On the morning of November 20 Monfils heard that Kutska was bragging that he would be picking up a copy of the tape after work that day. (Tr. 441). At approximately 10:00 a.m. Monfils called the Department for the fifth time and spoke again to Specialist Lampkin, repeating his fear and concern about the tape. Lampkin told him again that the tape would not be released and transferred him to petitioner James Taylor, one of the Department's three Deputy Chiefs. (Tr. 581-84).

Monfils told Taylor about his November 10 report of theft to the Police and his insistence that it remain anonymous. (Tr. 610, 615; Ex. 15). He told Taylor that Kutska was going to get a tape of the call from the Police, from which he could identify Monfils, and that Monfils would be in grave danger from Kutska if the tape was actually released. Taylor realized that Monfils feared greatly for his safety if Kutska and his co-workers found out that he

had called the Police, and he concluded without hesitation that the tape should not be released. Taylor assured Monfils that the tape would not be released.[3] (Tr. 596, 597, 637).

Still afraid, Monfils spoke to Brown County Assistant District Attorney Pat Hitt. Monfils described his anonymous report and Kutska's effort to get the tape (Tr. 656-59), and he told Hitt that he had already spoken with Lampkin and Taylor. Monfils told Hitt that Kutska was violent and dangerous and could identify Monfils from the tape, and he repeated several times that he would be in serious danger if the tape was released. (Tr. 658-59, 669).

Hitt concluded immediately that the caller was a confidential police informant seeking protection of his identity (Tr. 658, 666, 669, 680-681), and that the tape was exempt from release under Wisconsin's Open Records Law and should not be given to Kutska. (Tr. 685).[4] Hitt

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[3] Although Taylor claims Monfils did not mention anything about his fear of Kutska, Taylor's 'report' and recollection of that phone conversation is implausible and grossly incomplete. Compare Taylor's testimony to Servais' report (Ex. 10) (crazy and a biker type, great fear), Lt. LaTour's taped conversation (fear of being murdered), and Monfils' phone conversation with Hitt, just minutes after Taylor's, during which he told Hitt several times how fearful he was. (Ex. 9, pp. 6-8, Tr. 658, 669) Lastly, Taylor did not deny that Hitt told him of Monfils' fear, but merely claimed that he could "not recall". (Tr. pp. 607, 659).

[4] The Wisconsin Open Records Law contained exemptions for the release of records that would endanger an individual's life or safety, or records that would identify a confidential informant. § 19.35(1)(am)2a and b, Wis. Stats. (1991-92). Furthermore, the Department's own policies specified that

decided that he would intervene himself to prevent the tape's release, by calling both Taylor and Lampkin to inform them that the tape was exempt and should not be released without his prior authorization. (Tr. 659-662, 673). Hitt told Monfils that he would call Deputy Chief Taylor and tell him not to release the tape. (Tr. 659, 672).

Hitt believed that he had undertaken a duty to protect the caller. (Tr. 675). Hitt immediately called Taylor, who confirmed his familiarity with the situation. Telling Taylor that the caller sounded scared, Hitt informed Taylor that the tape was exempt from disclosure under Wisconsin law, and he instructed Taylor to take steps to prevent the tape's release. (Tr. 660-61, 678-79).

After Taylor confirmed that Specialist Lampkin worked with the tapes (Tr. 660-61), Hitt offered to call Lampkin to make sure the tape was not released. Taylor replied that he would take care of it, and he assured Hitt that the tape would not be released. The conversation ended, and Hitt concluded that the matter was taken care of and that Taylor would contact Lampkin and prevent release of the tape. Hitt therefore did nothing further to intervene. (Tr. 660-61, 672).

Had Hitt called Lampkin and told him not to release the tape, Lampkin would have directed Hitt to Records Office Manager Shay Gierczak or would have contacted her himself. (Tr. 573-74, 577, 675-76). In either case, Hitt's

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protection of a witness or an informant was sufficient reason to deny the request for a record (Ex. 17, p. 3), and that any request for a record that "may" be denied must be denied. (Ex. 18, § I, ¶¶ G, H).

instruction not to release the tape would have been given to Gierczak, and Kutska's request for the tape would have been denied. Because of her involvement with the matter the day before, Gierczak was fully aware that the tape had been copied and was sitting on a secretary's desk in Gierczak's office where Kutska was to pick it up that afternoon. (Tr. 551-54).

After telling Hitt that he need not contact Lampkin and that Taylor would take care of the matter, Taylor checked the Department's computer system for a report of Monfils' November 10 call. (Tr. 613-14). Finding none, Taylor decided to take no further action to prevent the impending release of the tape to Kutska. He made no effort to contact Lampkin or to inquire about the tape at the Records Office, where Gierczak had the tape, less than 30 feet from Taylor's office. (Tr. 600-601; Ex. 117, p. 2 ¶ 3).[5]

Four hours later, Kutska picked up the tape from the Records Office. (Tr. 441-42). Before the Police gave him the tape, Kutska had suspected five or six people of turning him in and had no intention of confronting Monfils. (Tr. 450-51). With the tape, Kutska immediately identified Monfils as his accuser. The next day Kutska and five co-workers brutally beat Tom Monfils, tied a 50-pound weight to his neck, and threw him, still alive, into

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[5] Taylor claimed that Monfils actually called on November 18, because he was an avid deer hunter and, thus, he was not at work on Friday, November 20 because it was the day before deer hunting season began. (Tr. 635). Even if true, this explanation hurts Taylor because it means he had more than two days to act on Hitt's instructions rather than four hours.

a pulp vat, where his mutilated body was found the next night. (Tr. 498, 845, 1099).

Monfils left a widow and two children, ages 9 and 11. Susan Monfils became so despondent after his murder that she attempted suicide. (Tr. 952-53, 955). The jury awarded the family just over $2 million in compensatory damages, which defendants have never challenged on appeal. The jury was not asked to consider punitive damages and none were awarded.

B. Procedural History

The Petition's Procedural History omits several relevant aspects of this case. On the Special Verdict form, the jury attributed 40 percent of the blame for Tom Monfils' death to defendant Taylor, more than any other defendant. The jury also found that Monfils himself was not contributorily negligent with respect to his own safety. (Pet. App. 23-24.)

After the district court entered judgment on June 30, 1997, defendants moved for judgment as a matter of law under Rule 50(b) or for a new trial under Rules 50(b) and 59. The district court denied these motions, stating that the evidence supporting plaintiffs' theory of liability was "overwhelming" and "more than sufficient to support the verdict." (Resp. App. 3, 4.) Defendants appealed from the amended judgment reflecting this ruling, entered on November 24, 1997. (Resp. App. 5, 6.)

After the Court of Appeals had issued its decision and its subsequent denial of Taylor's request for

rehearing and review *en banc*, Taylor moved to stay issuance of the Court's mandate, arguing that the challenge he now raises in his Petition would present this Court with a substantial question for review. The Court of Appeals refused a stay and issued its mandate to the district court on February 4, 1999.

ARGUMENT FOR DENYING THE WRIT

Taylor has made no attempt to base his Petition on any conflict among the Courts of Appeals, nor could he. As Taylor himself concedes, the state-created danger theory of substantive due process liability based on *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) has been recognized by the great majority of the circuits,[6] and

[6] *E.g., Soto v. Flores*, 103 F.3d 1056, 1063-65 (1st Cir. 1997); *Dwares v. City of New York*, 985 F.2d 94, 99 (2nd Cir. 1993); *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364, 1373-75 (3d Cir. 1992); *Kneipp v. Tedder*, 95 F.3d 1199, 1207-1208 (3d Cir. 1996); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998); *Losinski v. County of Trempealeau*, 946 F.2d 544, 549-51 (7th Cir. 1991); *Reed v. Gardner*, 986 F.2d 1122, 1125-26 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990); *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc); *Wood v. Ostrander*, 879 F.2d 583, 589-95 (9th Cir. 1989), *cert. denied*, 489 U.S. 938 (1990); *L.W. v. Grubbs*, 974 F.2d 119, 121-22 (9th Cir. 1992); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996); *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 354-56 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990). In *Pinder v. Johnson*, 54 F.3d 1169, 1176-78 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 994 (1995), the Fourth Circuit Court of Appeals left unclear whether it would recognize this theory of liability but clearly

Taylor can point to no well-developed split of authority under this theory that could appropriately be resolved by granting certiorari in this case.

Instead, Taylor seeks to justify certiorari by claiming that the Court of Appeals' opinion conflicts with *DeShaney* and the decisions following it in the Seventh Circuit and elsewhere, by improperly expanding the scope of substantive due process to reach state conduct that consists solely of "inaction" in the face of private danger. Taylor can make this argument, however, only by pretending that the conduct at issue here consisted of nothing more than a "failure to take more affirmative steps" to protect Tom Monfils and that the court below found such inaction sufficient, in itself, to violate the Due Process Clause.

This is an egregious misrepresentation of what has occurred in this case. As any fair reading of the evidence and decision below demonstrates, Tom Monfils was placed in mortal danger, far greater than he would otherwise have faced, by the affirmative acts of Deputy Chief Taylor himself and other state actors of whose conduct Taylor was fully aware. This case is thus squarely consistent with *DeShaney* and its progeny, and a grant of certiorari to resolve petitioner's illusory "conflict" with this law would be futile and improvident.

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acknowledged the extent to which the courts in other circuits had done so.

THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH *DESHANEY*, AND THERE IS THEREFORE NO CONFLICT REQUIRING RESOLUTION BY THIS COURT

DeShaney made clear that the Due Process Clause imposes no affirmative obligation on the state to protect its citizens against the danger of private violence from other citizens when the state itself has played no part in creating such danger. A citizen therefore has no constitutional right to demand protection from such danger, and the state's failure to provide such aid – even when the danger is clearly known and the state has given assurance of protection – "simply does not constitute a violation of the Due Process Clause." 489 U.S. at 194-97, 201-203. In such a case, the Court made clear, "[t]he most that can be said of the state functionaries . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* at 203.

But Monfils did not face a purely private danger of this kind, in which the state had played no role. He did not come to the Green Bay Police telling them that some private person – a co-worker, for example – had overheard him reporting Keith Kutska's theft and was about to reveal Monfils' identity to Kutska. Monfils did not ask the Police to provide protective services against the danger this private action posed – by questioning Kutska, for example, or placing him under surveillance, or by intervening with the co-worker to prevent disclosure of Monfils' identity. Nor is this a case in which the Police first assured Monfils of such protection from purely private danger but then "stood by and did nothing" to provide it.

Instead, this is a case in which the state knew of the dangers Keith Kutska posed to Monfils and also "played [a] part in their creation" and "render[ed] him . . . more vulnerable to them." *Id.*, 489 U.S. at 201. *DeShaney* and numerous Seventh Circuit decisions make clear that where the state itself has played an active role in creating or enhancing the danger to a citizen – including the danger of violence by other, private actors – the state does then owe an affirmative duty of protection to that citizen. *Id.* at 197, 201; *Losinski v. County of Trempealeau*, 946 F.2d at 549-51 ("The essence of the Court's exception in *DeShaney* is state creation of dangers faced or involuntary subjection to known risks"); *Reed v. Gardner*, 986 F.2d at 1125-27 (liability, under *DeShaney*, if officers "knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger"); *Wallace v. Adkins*, 115 F.3d 427, 428-29 (7th Cir. 1997) ("affirmative duty of care and protection on the part of the State" exists, under *DeShaney*, when the state "affirmatively places the individual in a position of danger the individual would not otherwise have faced"). *See also Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065 (1989) ("When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk").

The cases articulating this state-created danger doctrine also clearly recognize that, after the state has acted to create a danger or to render a citizen more vulnerable to an existing danger, the resulting affirmative duty to protect the citizen from that danger may be violated as much by *inaction* – by "doing nothing" to fulfill that

affirmative duty – as by further affirmative acts. Chief Judge Richard Posner captured this aspect of the rule exactly in a seminal pre-*DeShaney* passage that has been widely quoted since *DeShaney* was handed down:[7]

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). Echoing this theme, decisions in the Seventh and other circuits have made clear that official inaction in the face of a danger that the state has played an affirmative role in creating will suffice to establish substantive due process liability. *E.g., Gibson v. City of Chicago*, 910 F.2d at 1521 n. 19 (city could be liable where police "affirmatively trained and outfitted" officer with firearms, but then "failed to recover that equipment" after officer was found unfit for duty); *Dwares v. City of New York*, 985 F.2d at 99 (police officers liable where they "conspired with" skinheads to permit beating of demonstrators and then allowed prolonged assault "without interfering with the

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[7] *E.g., D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d at 1374; *Kneipp v. Tedder*, 95 F.3d at 1207; *Kallstrom v. City of Columbus*, 136 F.3d at 1066; *Gibson v. City of Chicago*, 910 F.2d 1510, 1521 n. 19 (7th Cir. 1990); *Wood v. Ostrander*, 879 F.2d at 594; *Uhlrig v. Harder*, 64 F.3d at 572 n. 6; *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d at 354.

attack"); *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d at 357-58 (government officials liable where they "affirmatively acted" in bringing prison inmates into community but then "did nothing to alleviate or protect against the danger").

No matter how much Taylor may wish to obscure the fact, this case falls squarely within these straightforward rules, and the decision below is thus wholly consistent with *DeShaney* and its progeny. In this case it was the state *itself*, through the affirmative acts of Deputy Chief Taylor and other Police personnel subordinate to him, that first created and then proceeded to produce for Keith Kutska the sole means by which he could discover Monfils' identity, thus rendering Monfils highly vulnerable to a danger of violence from Kutska that would otherwise have remained only hypothetical. Under *DeShaney*, therefore, Taylor acquired an affirmative duty to protect Monfils from this danger. His eventual decision to "do nothing" was thus a classic failure to fulfill that obligation, and his conduct was a clear violation of Monfils' substantive due process rights.

When Monfils first called the Green Bay Police Department, insisting on anonymity, it was the Police themselves who, without Monfils' knowledge or consent, made a recording of his call that was the only means through which the latent threat of private violence by Kutska could be transformed into an actual danger of retaliation against Monfils himself. And after Kutska discovered the existence of this recording and approached the Police to get a copy, it was Lt. Michael Mason, with help from Records Office Manager Shay Gierczak, who swallowed Kutska's claim to have been defamed and took

it upon himself to find and copy the recording, to call Kutska to tell him when and how he could pick up the tape, and then to place the tape in the Records Office less than 30 feet from Deputy Chief Taylor's own office.

The evidence also demonstrates that Taylor was aware of these affirmative acts by officers and employees in his own Department, and of their dire import for Monfils' safety. Taylor himself conceded that Monfils told him that he had reported Kutska, insisting on anonymity, and that Kutska was after the recording of the call and would be able to identify Monfils from it. But the evidence also establishes that Taylor knew much more than this about the danger in which the Police had already placed Monfils.

Lt. Mason told Kutska on November 19 that he could pick the tape up the next day, and Monfils learned the next morning that Kutska would be picking up the tape that afternoon. The jury therefore had ample reason to conclude that when Monfils called Taylor that morning, much alarmed, he told Taylor not just that Kutska had requested the tape from the Police but that they were actually going to give it to him later that day. This newly urgent threat and the clarity and vehemence of Monfils' previous descriptions of Kutska to the Police also strongly reinforce the evidence that Monfils did indeed inform both Taylor and Assistant DA Hitt in the clearest possible terms that Kutska was violent and dangerous and that Monfils feared greatly for his safety if Kutska were to get the tape and identify him from it. As the Court of Appeals found, "Taylor knew of the increased danger, for he talked to Monfils about it." (Pet. App. 17.)

Taylor also testified that he had concluded, even before Hitt called him, that the tape must not be released to Kutska. Hitt then reinforced that conclusion, telling Taylor that Monfils sounded scared and *instructing* Taylor – rather than merely "opining," as the Petition would have it (p. 4) – that the tape was exempt from disclosure under Wisconsin law and should not be released to Kutska.

By the time Hitt had issued this instruction, therefore, Taylor knew clearly that subordinate members of his own Department had already acted affirmatively to increase greatly the danger Kutska posed to Monfils. Taylor knew that the Police were soon going to give to a dangerous and violent thief a Police recording that would irretrievably destroy the confidentiality of an anonymous citizen informant, and Taylor knew that this impending disclosure was improper under state law and contrary to the most fundamental obligations of law enforcement agencies to their citizen informants. (Tr. 828).[8] Despite this knowledge, however, Taylor then proceeded to take affirmative actions of his own that did not just heighten Monfils' vulnerability to violent retaliation by Kutska but in fact guaranteed, in and of themselves, that he would be subject to such danger in a manner that he would not have been had Taylor not acted as he did.

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[8] *Dole v. Local 1942, Intern. Broth. of Elec. Workers, AFL-CIO*, 870 F.2d 368, 372 (7th Cir. 1989); *Simmons v. City of Racine, PFC*, 37 F.3d 325, 328, 329 (7th Cir. 1994). *Cf. Maynard v. City of Madison*, 101 Wis.2d 273, 284, 304 N.W.2d 163 (Ct. App. 1981); *State v. Outlaw*, 108 Wis.2d 112, 121, 321 N.W.2d 145, 151 (1982); *State v. Watkins*, 39 Wis.2d 718, 159 N.W.2d 675 (1968); § 905.10, Wis. Stats. (1991-92).

After speaking to Monfils, Assistant DA Hitt had decided to act himself to prevent the tape's release, not just by contacting Taylor but also by calling Specialist John Lampkin, who, Hitt knew, was already familiar with Monfils' plight. After Taylor confirmed to Hitt that Lampkin was responsible for working with the tapes, Hitt offered to follow through by contacting Lampkin himself to order that the tape not be given to Kutska. Had Hitt done so, the evidence leaves no question that the impending release of the tape and the danger it posed to Monfils would have been averted. Hitt would immediately have called Lampkin, and Lampkin himself confirmed that he would then have referred Hitt directly to Records Manager Shay Gierczak or contacted her himself. Had Hitt actually contacted Lampkin, therefore, he or Lampkin would have learned quickly from Gierczak that Kutska's copy of the tape was at that moment waiting on a nearby desk in the Records Office, and its release would then have been stopped cold on the strength of Hitt's authoritative instructions.

As it was, however, Taylor acted to deter Hitt from contacting Lampkin or following through by other means to prevent release of the tape. As the Court of Appeals found, "Taylor said he would take care of it, and he assured Hitt that the tape would not be released" (Pet. App. 5), and the direct result, as Taylor intended, was that Hitt took him at his word and did nothing further. These are *affirmative* acts on Taylor's part. Had he in fact "done nothing" at this juncture, Hitt would have intercepted the tape, and it was only Taylor's active intervention that forestalled that outcome.

The inevitable result of Taylor's conduct, moreover, was to render Monfils substantially more vulnerable to the danger posed by Kutska than he would otherwise have been. Had Taylor not intervened, the only protection that Monfils needed from the Police – that they simply refuse Kutska's request for the tape – would finally have been given, and Monfils would once again have been safe from Kutska. By acting to cut off Hitt's intervention, therefore, Taylor removed the last effective bar to release of the tape and placed Monfils, once again, in extreme danger.

Taylor's actions are thus the very essence of what *DeShaney* meant by danger that the state itself has affirmatively "played [a] part in creating" (189 U.S. at 201), and his conduct in this case was therefore anything but "merely passive," as the Petition would have the Court believe. When Taylor checked his computer, after finishing with Hitt, and then decided to "do nothing" to prevent release of the tape, he had already acted affirmatively to "place [Monfils] in a position of danger [he] would not otherwise have faced" (*Wallace v. Adkins*, 115 F.3d at 429), and Taylor thus had an affirmative duty to "protect him to the extent of ameliorating the incremental risk" (*Archie v. City of Racine*, 847 F.2d at 1223), by taking the few simple steps that would have intercepted the tape before it was released to Kutska that afternoon. Taylor's utter failure to take those steps, therefore, was not the whole of his role in this case, as he now pretends, but only its tragic second act, and Taylor's conduct thus constitutes a clear substantive due process violation within the meaning of *DeShaney*.

None of this was lost on the Court of Appeals, which plainly recognized in its Opinion that Taylor's violation rested both on his assurance to Hitt that he need not act to intercept the tape because Taylor would, and on Taylor's subsequent failure to follow through. The Opinion opens with an accurate exposition of the state-created danger doctrine, including the requirement that the state have acted "affirmatively" to place the plaintiff in new or heightened danger (Pet. App. 7-8), and the Court later reiterates the necessary elements of such a claim: First, "what actions did the [state actors] affirmatively take," and second, "what dangers would [the plaintiff] otherwise have faced." (Pet. App. 10.) After rejecting plaintiff's ratification claim, the Opinion then returns to the issue of whether Taylor's conduct constitutes a substantive due process violation, and the Court leaves no doubt about its ultimate conclusions regarding the actions Taylor took and the degree of danger that Monfils would otherwise have faced:

> Taylor created a danger and, by assuring Hitt (the assistant district attorney) that he would make sure the tape was not released but not following through, he created a danger Monfils would not otherwise have faced.

(Pet. App. 12-13.) And later in the Opinion, the Court turns to the question "whether the evidence was sufficient for the jury to conclude that Taylor placed Monfils in a position of danger greater than he would otherwise have faced." Answering in the affirmative, the Opinion concludes:

> To repeat ourselves, Taylor knew of the increased danger, for he talked to Monfils about

> it. He was told by Hitt that the tape fell within an exception to the Open Records Law and should not be released. He assured Hitt that he would prevent its release, but he nevertheless allowed it to get out, which, in turn allowed Kutska to identify Monfils as the informant. As an experienced police officer, Taylor knew the dangers informants face. Given these facts, it is hard to imagine how the jury could have failed to conclude that Taylor placed Monfils in a position of heightened danger.

(Pet. App. 16-17.)

No court or litigant in the future could read this exposition of the state-created danger issue and come away convinced that the Seventh Circuit had somehow departed from *DeShaney* and, for the first time, found a substantive due process violation solely on the basis of a state actor's "inaction" or his "failure to take more affirmative steps" to protect a citizen from a danger that state actor had played no role in creating. No matter how many times the Opinion recites that Taylor "did nothing" after speaking to Hitt, the Court is clearly not implying that it was this inaction, in itself, that constituted the creation or enhancement of danger by the state that the Opinion explicitly recognizes as a requirement for a substantive due process violation. The Court understood, instead, that Taylor had elected to do nothing more to protect Monfils only after he had first actively cut off Hitt's intervention, and it is the combination of these actions that the Opinion identifies as the true basis of its substantive due process holding.

In a telling acknowledgment of this fact, Taylor's final argument suggests that even though Taylor *did* act

affirmatively by giving an assurance that Monfils would be protected, such conduct would somehow still be insufficient to support a substantive due process violation. (Petition, pp. 13-14.) But none of the cases Taylor cites provides any support for this last-ditch argument. In each of these cases the challenged police conduct – the implicit or explicit assurances of protection in *Losinski* and *Pinder* and the inept medical advice in *Archie* – was given to the victim herself, and the link between that police conduct and the victim's resulting failure to engage in "self help" was either highly uncertain or, as in *Archie* (847 F.2d at 1216, 1218), altogether unproven.

This case is fundamentally different. To be sure, Taylor did make a promise to Monfils himself that the tape would not be released, but it is not this promise or Monfils' own response to it that lie at the heart of Taylor's substantive due process liability. Whatever Taylor may have said to Monfils himself, Taylor also engaged in affirmative conduct toward a third person – Assistant DA Hitt – who fully intended to give Monfils effective and authoritative protection from release of the tape, and there is no question that Taylor's affirmative assurances to Hitt had the purpose and effect of deterring Hitt from acting and thus cut off an official source of certain rescue for Monfils. Taylor's conduct is therefore far more comparable to cases such as *Freeman v. Ferguson*, 911 F.2d at 54, holding that substantive due process liability could exist under *DeShaney* where a police officer affirmatively interferes with official protective services that would otherwise have been provided by the police themselves, or *Ross v. U.S.*, 910 F.2d 1422, 1431 (7th Cir. 1990), finding substantive due process liability where the police actively interfere with effective rescue even from *private* sources.

Moreover, in none of these cases – including *Freeman* and *Ross* – was it the police *themselves* who had created the very conditions from which the victim needed protection in the first place, by revealing the location or identity of the victim, for example, or in some other fashion increasing the victim's vulnerability to private violence. Had such circumstances been present in any of these cases, as they plainly were here, there is no question that the Courts of Appeals – even in the Fourth Circuit – would have found liability against an officer who had acted to deter the police from rescuing a citizen from a known danger that the police themselves had played a central role in creating.

CONCLUSION

Taylor has thus failed to establish any viable ground on which to grant his Petition. No amount of semantics can disguise the fact that Tom Monfils was placed in danger by affirmative state conduct within the meaning of *DeShaney* and the decisions following it, and there is thus no conflict of law that this Court can or should intervene to resolve.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SUSAN MONFILS, As Special Administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS and JOHN-THOMAS MONFILS, By BRUCE R. BACHHUBER, Their Guardian Ad Litem,

Plaintiffs,

v.

CITY OF GREEN BAY, A Municipal Corporation, CITY OF GREEN BAY POLICE DEPARTMENT, CITIES AND VILLAGES MUTUAL INS. CO., a Wisconsin Insurance Corporation, DEPUTY CHIEF JAMES TAYLOR, JOHN LAMPKIN, MICHAEL MASON, KEN LATOUR and DENISE SERVAIS,

Defendants.

Case No. 95-C-1239

(Filed Nov. 24, 1997)

DECISION AND ORDER

The Defendants in the above-captioned case have moved for judgment as a matter of law or, in the alternative, for a new trial. *See* Federal Rules of Civil Procedure 50(b) & 59. The grounds raised by the Defendants are as follows:

> 1. There was no legally sufficient evidentiary basis for the jury to find that the City of Green Bay ratified unconstitutional conduct on

the part of Deputy Chief Taylor and that this was a cause of injury to Thomas Monfils.

2. The Court's instructions on due process and ratification regarding Taylor were erroneous and prejudicial.

3. The court erroneously excluded evidence on Chief Langan's efforts to lobby for changes in the Open Records law, the enactment of § 19.36(8), Wis. Stats., and the change in department policy.

4. There was no legally sufficient evidentiary basis for the jury to find that the City of Green Bay deprived Thomas Monfils of his right to equal protection under the law.

5. The Court's instruction on equal protection was erroneous and prejudicial.

6. The actions of the individual defendants, Denise Servais, Kenneth LaTour, John Lampkin, Michael Mason and James Taylor were discretionary, entitling them to discretionary act immunity, and not "ministerial," as the Court ruled as a matter of law.

7. The Court erred by failing to instruct on the Open Records Law.

8. The murder of Thomas Monfils was a superseding cause of injury to the plaintiffs.

9. The plaintiffs' claims must be dismissed on grounds of public policy.

10. The Court erred by refusing to admit evidence and to submit questions about the causal negligence of other persons and entities on the special verdict form.

Motion for Judgment Under Rule 56(b), or Alternatively, for a New Trial Under Rules 50(b) and 59 at 1-2.

When ruling on a motion for judgment as a matter of law following the return of a jury's verdict, the court cannot reweigh the parties' evidence or pass on the credibility of witnesses or substitute its own judgment of the facts for that of the jury. Instead, it must view the evidence most favorably to the parties against whom the motion is made and give those parties the benefit of all reasonable inferences that may be drawn from the evidence. *See Haley v. Gross*, 86 F.3d 630, 632 (7th Cir. 1996). The Defendants must convince the court that no reasonable jury could have found for the Plaintiffs. *See Maier v. Lucent Technologies, Inc.*, 120 F.3d 730, 738 (7th Cir. 1997).

Under this standard, the court concludes that the Defendants are not entitled to judgment as a matter of law. They have not persuaded the court that the legal issues they raise (which were already addressed on the record at trial) should be reconsidered and the factual evidence was more than sufficient to support the verdict.

A new trial may be granted if the verdict is against the weight of the evidence, the damages are excessive, or if the trial was not fair. A motion for a new trial can also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions. *See Eastern Natural Gas Corporation v. Aluminum Company of America*, 126 F.3d 996 (7th Cir. 1997); *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996).

In this case the court does not believe that a new trial is warranted to prevent injustice. The verdict is not against the clear weight of the evidence. To the contrary,

the evidence supporting the Plaintiff's theory of liability was overwhelming. Moreover, the court considered all the legal grounds raised by the Defendants during trial and is not left with a definite or firm conviction that a mistake has been made.

For these reasons, the court ORDERS that the Defendants' "Motions for Judgment Under rule 50(b), or Alternative, for a New Trial Under Rules 50(b) and 59" (filed July 10, 1997) ARE DENIED.

IT IS FURTHER ORDERED that the Clerk of Court shall enter an order denying post verdict relief as a separate document. *See* Federal Rule of Civil Procedure 58.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 24th day of November, 1997.

/s/ Thomas J. Curran
Thomas J. Curran
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN District of WISCONSIN

AMENDED
JUDGMENT IN
A CIVIL CASE

SUSAN MONFILS, As Special Administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS and JOHN-THOMAS MONFILS, By BRUCE R. BACHHUBER, Their Guardian Ad Litem,

v.

CASE NUMBER:
95-C-1239
(Filed Nov. 24, 1997)

CITY OF GREEN BAY, A Municipal Corporation, CITY OF GREEN BAY POLICE DEPARTMENT, CITIES AND VILLAGES MUTUAL INS. CO., a Wisconsin Insurance Corporation, DEPUTY CHIEF JAMES TAYLOR, JOHN LAMPKIN, MICHAEL MASON, KEN LATOUR and DENISE SERVAIS,

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' "Motions for Judgment Under Rule 50(b), or alternative,

for a New Trial Under Rules 50(b) and 59" (filed July 10, 1997) ARE DENIED.

Dated: November 24, 1997

/s/ SOFRON B. NEDILSKY, Clerk

/s/ D. McLeod
(By) Deputy Clerk